

MV 97-9

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Vehicle Used Interstate For Hire)  
Use Tax on Purchase (Non-Filer) Extended Statute of  
Limitation

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	Case No.
	)	IBT No.
v.	)	NTL
	)	
TAXPAYER	)	Administrative Law Judge
Taxpayer	)	Mary Gilhooly Japlon

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Richard A. Rohner, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of TAXPAYER

**SYNOPSIS:**

This matter comes on for hearing pursuant to the timely protest by TAXPAYER (hereinafter "TAXPAYER" or "taxpayer") of Notice of Tax Liability ("NTL") No. XXXXX issued by the Department of Revenue (hereinafter "Department") on July 16, 1992 in the amount of \$505,662 for Use Tax, penalty and interest due on the purchase of buses, bus parts and fuel. This amount was ultimately reduced based upon an Order entered June 29, 1995 dismissing that part of the liability corresponding to the buses as the assessment was outside the statute of limitations. In addition, by the same Order, portions of the assessment were dismissed on the basis that the tax had been paid by

the retailer. At hearing, the taxpayer withdrew its protest regarding its fuel purchases. What remains, therefore, is that part of the assessment pertaining to the purchase of bus parts.

At hearing, John Benish, Jr. testified on behalf of the taxpayer, and Lorraine Elzy testified as an adverse witness for the taxpayer. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its purchase of bus parts. The parties filed a Stipulations of Fact (Joint Ex. 1). Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

**FINDINGS OF FACT:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing in the amount of \$269,232 for state Use Tax delinquencies and penalty. (Dept. Ex. No. 1; Tr. pp. 8, 11).

2. On July 16, 1992, the Illinois Department of Revenue issued Notice of Tax Liability No. SF 199219685401003 to the taxpayer. (Joint Ex. 1, par. 4, Ex. B).

3. The audit period is July 1, 1981 through August 31, 1990. (Joint Ex. 1, Ex. B).

4. On July 29, 1992, the taxpayer timely filed its protest of the assessment. (Joint Ex. 1, par. 5).

5. On June 29, 1995, an Order was entered dismissing that portion of the assessment corresponding to bus purchases as it was beyond the statute of limitations. (Joint Ex. 1, par. 7).

6. In the same Order, that portion of the assessment from January 1, 1986 through December 31, 1988 was dismissed on the basis that the tax had been paid by the retailer, SALES, Inc. (Joint Ex. 1, par. 8).

7. Based upon these revisions, the tax was reduced to the amount of \$124,260. (Dept. Ex. No. 1, pars. 9, 10).

8. TAXPAYER is an Illinois corporation. (Joint Ex. 1, par. 1).

9. TAXPAYER received a grant of authority from the Interstate Commerce Commission on July 25, 1958, amended April 26, 1985, to operate as an interstate carrier of passengers for hire. (Joint Ex. 1, par. 2, Ex. A; Tr. p. 13).

10. TAXPAYER is in the business of transporting passengers via bus for schools and private organizations. (Joint Ex. 1, par. 3; Tr. pp. 15-16).

11. TAXPAYER produced to the Department trip tickets showing trips across state lines or with passengers in route across state lines for 91 of its buses for the years 1986 through 1990, and summaries with respect thereto. (Joint Ex. 1, par.. 11).

12. The summaries referred to in the preceding paragraph reflect that each of the 91 buses is used on trips across state lines or with passengers in route across state lines between five to ten percent of its use each year. (Joint Ex. 1, par. 11).

13. This percentage of use existed for the entire assessment period. (Joint Ex. No. 1, par. 14).

14. The trip tickets produced by the taxpayer pertaining to the 91 buses represent approximately 81.25% of the taxpayer's fleet of buses during the period 1986 through 1990. (Joint Ex. 1, par. 12).

15. The parts purchased by the taxpayer were incorporated into and used pro-rata in the taxpayer's fleet of buses. (Joint Ex. 1, par. 13).

16. The taxpayer is involved in taking people to other out-of-state carriers, such as to O'Hare International Airport, Midway Airport and to train depots. (Tr. p. 21).

17. Trip tickets are prepared by the taxpayer for each trip a bus takes, whether it be in-state or out-of-state. (Tr. pp. 25-26).

18. Trip tickets provide details of the trip, and also serve as an invoice to the customer. (Tr. pp. 24-25).

19. When the taxpayer purchases a bus, it intends to use it on both in-state, as well as out-of-state trips. (Tr. p. 27).

20. The taxpayer purchases bus parts from SALES, Inc. with the intention of putting them in a bus. (Tr. p. 28).

21. The taxpayer does not engage in retail or wholesale sales of parts to outside companies; it uses the parts on its own buses. (Tr. p. 28).

22. The taxpayer has had its own shop and mechanics to repair its buses since the early 1980's. (Tr. pp. 28, 31).

23. There is a main warehouse that houses bus parts for a group of different school bus companies. (Tr. p. 34).

24. The main warehouse is maintained by SALES, Inc., a subsidiary of Illinois Corporation. (Tr. pp. 34-35).

25. SALES, Inc. purchases the parts from the manufacturer, and the taxpayer purchases them from the warehouse maintained by SALES, Inc. (Tr. p. 35).

26. The taxpayer keeps a certain amount of parts on hand at the company for everyday use. (Tr. p. 34).

**CONCLUSIONS OF LAW:**

The Department prepared corrected returns for Use Tax liability pursuant to section 5 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 ILCS 120/5). Said section is incorporated by in the Use Tax Act via section 12 thereof (35 ILCS 105/12). Section 5 of the ROT Act provides in pertinent part as follows:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. ... Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 ILCS 120/5).

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of repair parts for its fleet of buses. The taxpayer asserts that the

purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

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(b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 **ILCS** 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 **ILCS** 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (See, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated that the taxpayer received a grant of authority from the Interstate Commerce Commission to operate as an interstate carrier of passengers for hire. (Joint Ex. 1, par. 2, Ex. A).

Regarding the requirement that the interstate carriers must be "for hire", the administrative rules provide that "[t]he term 'rolling stock' includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)", but the exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that it is an interstate carrier for hire using rolling stock that transports persons or property moving in interstate commerce. The taxpayer has met the threshold requirement that it is an interstate carrier for hire.<sup>1</sup> It must now prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles) transports, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois" and therefore, qualifies for the rolling stock exemption.<sup>2</sup> Furthermore, as

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<sup>1</sup>. In paragraph 11 of the stipulation, the parties state that "... each bus is used *on trips across state lines* or with passengers in route across state lines between 5% to 10% of its use each year." (Emphasis supplied). It is to be noted that the emphasized language could be interpreted as meaning that the buses crossed state lines without carrying any passengers or property. If this were the case, the buses would not be "for hire" and therefore, would not even meet the threshold requirement of being an "interstate carrier for hire". However, as paragraph 11 of the stipulation provides that the taxpayer produced to the Department trip tickets, the nature of which indicate details of charter trips of passengers (see, Finding of Fact, paragraph 18), it can be assumed that the stipulation meant to indicate such. On the other hand, it must be noted, though, that there are no trip tickets in evidence for me to review.

<sup>2</sup>. Chapter I, Section 130.340(a) of 86 Ill. Admin. Code provides that "...the Retailers' Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce... ." Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, "... persons whose journeys or property whose shipments, originate or terminate outside Illinois on

repair parts, not buses, are at issue herein, the taxpayer must prove that the parts it purchased were incorporated into rolling stock that moved in interstate commerce.

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

(c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.

(d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

The stipulation of record (Joint Ex. 1) provides in paragraph 11 that "TAXPAYER produced to the Department trip tickets showing trips across state lines or with passengers in route across state lines for 91 of its busses for the years 1986 through 1990 and summaries with other carriers. ...". Therefore, the rolling stock exemption itself is explicative of the phrase "interstate commerce".



respect thereto. These summaries reflect that each bus is used on trips across state lines or with passengers in route across state lines between 5% to 10% of its use each year." Paragraph 12 of the stipulation provides that the 91 buses for which trip tickets were produced constitute 81.25% of taxpayer's fleet of buses during the years 1986 through 1990. Furthermore, per paragraph 13 of the stipulation, the parts purchased were incorporated into and used pro-rata in the fleet. The parties further stipulated in paragraph 14 that the 5% to 10% use of each bus across state lines or with passengers in route across state lines is applicable to the entire liability period.<sup>3</sup>

The taxpayer's case is replete with serious problems. In order for the repair parts purchased by the taxpayer to be accorded the rolling stock exemption from Use Tax, the taxpayer must prove with documentary evidence that each part was incorporated into a particular bus that moved in interstate commerce during the audit period. The parties stipulated that the parts were incorporated into and used pro rata in taxpayer's fleet. Regardless of this agreement, however, it is clear from the same stipulation that no trip tickets were provided for fully 18.75 percent of the taxpayer's fleet of buses. Of the 91 buses for which trip tickets were produced (i.e., 81.25% per the fleet), it was stipulated that each of those buses was used on trips across state lines or with passengers in route across state lines from 5 to 10 percent of its use each year. Nowhere in the record is it delineated which bus or buses took interstate trips that constituted

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<sup>3</sup>. It is to be noted that paragraphs 13 and 14 of the stipulation are rather unclear. I presume that I have accurately construed them.

five, six, seven, eight, nine or ten percent of its annual trips. There is no evidence as to the number of trips to which the percentage figures equate, nor is there any evidence distinguishing the types of trips taken by each bus (i.e., trips across state lines, as opposed to trips with passengers in route across state lines). Certainly, for 18.75 percent of taxpayer's fleet, there is absolutely no evidence concerning any interstate usage at any time. Given the dearth of evidence concerning the movement of any particular bus in interstate commerce, it would be impossible to accord any of the vehicles the rolling stock exemption. If the buses are not exempt, neither can the parts be exempt.

The information regarding the types and number of trips taken by each bus is of probative value because the rolling stock exemption specifically only exempts rolling stock used to transport persons or property whose journeys or shipments originate or terminate outside of Illinois. There is a distinction between trips to airports to transport passengers in route across state lines, as opposed to charter trips to neighboring states wherein the trip arguably originates and terminates in Illinois. There is no law in Illinois, whether it be case, statutory or regulatory, that sets forth a threshold number of qualifying trips which must be met before the rolling stock exemption can be invoked. However, without this specific evidentiary segregation set forth in the record, there would be no way to confer exempt status on any bus, even if the facts revealed a diminimus number of trips to airports with passengers intending to leave this State.

Most certainly, therefore, the parts cannot be determined to be exempt as the bus they *may* have gone into did not qualify as rolling stock. I emphasize that the part(s) may or may not have been used in what might be an exempt vehicle. In addition to proving that the bus(es) moved in interstate commerce, the taxpayer must prove that the part for which it seeks the exemption was used in a specific bus that is exempt. This is an accurate statement even assuming that each part purchased was truly fungible because again, the bus which received the part must have moved in interstate commerce as rolling stock. In any event, as there is no proof of this suggestion, it need not be considered in further detail.

An additional consideration compounds the problems that plague the taxpayer's case. The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397 (1st Dist. 1978) is pertinent to this matter. The Court held in that case that it in order to for the rolling stock exemption to apply, the interstate use of the rolling stock must have occurred during the audit period. As the exemption is claimed by the taxpayer at the time of purchase, the record must indicate that all of the buses are used as rolling stock. There must also be an indication how the determination is made by the taxpayer to claim the exemption on its bus purchases. The parts in issue are warehoused for future use. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the part, by happenstance, on rolling stock six months, eight months or one year later. The stipulation indicates that 81.25 percent of taxpayer's buses were used in trips across state lines or with passengers in route across state lines between 5 percent

to 10 percent of their use each year for all periods covered by the assessment. As to 18.75 percent of the fleet, these vehicles may never have moved in interstate commerce. Thus, there is no evidence that the parts at issue were used anywhere near the audit period, or even used on exempt tangible personal property.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 ILCS 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax.

There is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. As sparse as they may be, given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Regardless, the taxpayer presented no evidence that multistate taxation was actual or probable. (See, Complete Auto Transit, Inc. v. Brady, *supra*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various

transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court therefore found that Burlington Northern's physical movement across state lines 13 percent of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.<sup>4</sup>

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that

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<sup>4</sup>. The taxpayer also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc., the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefore, qualifies for the exemption.

I find Time, Inc. to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright, 38 Ill.2d 272 (1967)). Time, Inc. simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation ..." is a comment on the intent behind granting the exemption.

"[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances... ." This appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington Court's determination that the preamble is meaningless and, therefore, merely superfluous. (See, also, Judge John A. Ward's findings in his Order of September 4, 1997 in National School Bus Service, Inc., v. Illinois Department of Revenue, 96 CH 13424).

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is .. intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to

discontinue its intrastate business would in great measure negatively affect its interstate business.

The business of Burlington Northern consists in great measure of the interstate movement of people and goods. On the other hand, judging from the inconsiderable amount of use allocated to trips across state lines, it is reasonable to conclude that the nature of the taxpayer's business is the intrastate transportation of passengers for schools. The parties stipulated that 81.25 percent of taxpayer's fleet of buses is used on trips across state lines or with passengers in route across state lines between 5 to 10 percent of its use each year. The ten percent figure approaches Burlington Northern's thirteen percent figure. Five percent, however, is significantly less.

In the case of First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358 (4th Dist. 1980), the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. The court denied the taxpayer the rolling stock exemption due to the fact that it lacked documentary evidence to indicate the amount of eligible exempt interstate commerce in which it engaged. In a concurring opinion, Justice Green opined that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

In the case at bar, the evidence that was presented is stipulated and summary in form. The body of facts is insufficient to determine

the actual percentage of trips taken by each of the 91 buses across state lines or with passengers in route across state lines, as well as to conclude that the trips taken by each bus were at all conducted on a fixed schedule or with any degree of regularity. And of course, there is no indication of any out-of-state trips for 18.75 percent of taxpayer's fleet. It is impossible to accord the repair parts the rolling stock exemption when the bus(es) into which they were placed are not eligible for the same.

As noted previously, when granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1955)). In the case at bar, TAXPAYER, Inc. has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the purchases of parts.

**RECOMMENDATION:**

It is my recommendation that NTL No. XXXXX be affirmed as to the purchase of fuel and bus parts, and as amended by Order of June 29, 1995 .

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Administrative Law Judge